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9 IN THE UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
12
13 Plaintiff,
14 v.
15 FRANCISCO JAVIER HERRERA-REYES,
Defendant.
16

CASE NO. 1:20-CR-00021-NONE-SKO

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER

DATE: April 3, 2020
TIME: 8:30 a.m.
COURT: Hon. Dale A. Drozd

17 This case is set for a fast-track status conference on April 3, 2020. On March 16, 2020, this
18 Court issued General Order 611, which suspends all jury trials in the Eastern District of California
19 scheduled to commence before May 1, 2020. This General Order was entered to address public health
20 concerns related to COVID-19.

21 Although the General Order addresses the district-wide health concern, the Supreme Court has
22 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
23 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
24 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
25 exclusion under" § 3161(h)(7)(A). *Id.* at 507. And moreover, any such failure cannot be harmless. *Id.*
26 at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
27 judge ordering and ends-of-justice continuance must set forth explicit findings on the record "either
28 orally or in writing").

1 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
2 and inexcusable—the General Order requires specific supplementation. Ends-of-justice continuances
3 are excludable only if “the judge granted such continuance on the basis of his findings that the ends of
4 justice served by taking such action outweigh the best interest of the public and the defendant in a
5 speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets
6 forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice
7 served by the granting of such continuance outweigh the best interests of the public and the defendant in
8 a speedy trial.” *Id.*

9 The General Order excludes delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code
10 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,
11 natural disasters, or other emergencies, this Court has discretion to order a continuance in such
12 circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance
13 following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court
14 recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United*
15 *States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the
16 September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a
17 similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

18 In light of the societal context created by the foregoing, this Court should consider the following
19 case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-
20 justice exception, § 3161(h)(7) (Local Code T4). If continued, this Court should designate a new date
21 for the [event]. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial
22 continuance must be “specifically limited in time”).

23 STIPULATION

24 Plaintiff United States of America, by and through its counsel of record, and defendant, by and
25 through defendant’s counsel of record, hereby stipulate as follows:

- 26 1. By previous order, this matter was set for status on April 3, 2020.
- 27 2. By this stipulation, defendant now moves to continue the status conference until May 8,
28 2020, and to exclude time between April 3, 2020, and May 8, 2020, under Local Code T4.

1 3. The parties agree and stipulate, and request that the Court find the following:

2 a) The government has represented that all of the discovery associated with this case
3 has been either produced directly to counsel and/or made available for inspection and copying.
4 The government has also provided a fast-track plea agreement to the defendant.

5 b) Counsel for defendant desires additional time to discuss the sentencing options
6 with his client given the pre-plea calculations provided by the Probation Office prior to signature
7 of the government's proposed-plea.

8 c) Counsel for defendant believes that failure to grant the above-requested
9 continuance would deny him/her the reasonable time necessary for effective preparation, taking
10 into account the exercise of due diligence.

11 d) The government does not object to the continuance.

12 e) In addition to the public health concerns cited by General Order 611 and
13 presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in
14 this case because counsel have been encouraged to telework and minimize personal contact to
15 the greatest extent possible. It will be difficult to avoid personal contact should the hearing
16 proceed.

17 f) Based on the above-stated findings, the ends of justice served by continuing the
18 case as requested outweigh the interest of the public and the defendant in a trial within the
19 original date prescribed by the Speedy Trial Act.

20 g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
21 et seq., within which trial must commence, the time period of April 3, 2020 to May 8, 2020,
22 inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4]
23 because it results from a continuance granted by the Court at defendant's request on the basis of
24 the Court's finding that the ends of justice served by taking such action outweigh the best interest
25 of the public and the defendant in a speedy trial.

26 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
27 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
28 must commence.

1 IT IS SO STIPULATED.

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4 Dated: March 20, 2020

McGREGOR W. SCOTT
United States Attorney

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6 /s/ LAURA D. WITHERS
LAURA D. WITHERS
Assistant United States Attorney

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9 Dated: March 20, 2020

/s/ BENJAMIN GERSON
BENJAMIN GERSON
Counsel for Defendant
FRANCISCO JAVIER
HERRERA-REYES

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14 **ORDER**

15 IT IS SO ORDERED.

16 Dated: March 20, 2020


UNITED STATES DISTRICT JUDGE